

Jerry O'Neil
Independent Paralegal
985 Walsh Road
Columbia Falls, MT 59912
406-892-7602

February 16, 2015

Here are some items to consider when you are thinking about how to vote on the Water Compact with the Confederated Salish and Kootenai Tribes:

Article III, B (page 13)

"Abstracts of Water Right. Abstracts of water right appended to this Compact are a substantive element of this Compact. The language of the abstracts, including all informational remarks, shall control in the event of any inconsistency between the Compact and the abstracts of water right; - - -"

It has been stated by others more versed in this than me, and from what I have read seems to be true, that the abstracts of water right give much more water to the Confederated Salish and Kootenai Tribes than they need and that are necessary for "the purpose of the reservation."

According to item 4, page 24, **Co-ownership of Instream and Public Recreation Water Rights Held by MFWP,**

According to Appendix 28, these water rights include on the Middle Fork and South Fork of the Flathead River, on the Rock Creek Basin and on the Blackfoot Basin.

Under these rights, the CS&K Tribes will have some sort of joint authority to establish, enforce, or jointly exercise these off-reservation water rights. While I doubt anyone really understands what this means, this appears to give some authority over Montana citizens' fishing and recreation rights to a quasi-sovereign government that is not subject to these citizens.

Paragraph i. on page 32: **"A Person who has both an entitlement to the delivery of water from the FIIP and a Water Right Arising Under State Law to serve the same acreage may only protect from Call, by entering into a consensual agreement pursuant to this Article III.G.3, a total quantity of water equal to the lesser of the annual FIIP quota for a given irrigation season, or an Alternate Value, for each acre served, irrespective of whether the water applied to each acre is pursuant to that Person's FIIP delivery right to that Person's Water Right Arising Under State Law."**

This takes away a person's water right and replace it with a "delivery right" of a lesser amount of water.

When the reservation was homesteaded under the allotment act pursuant to the Hell Gate Treaty of 1855, the non-Indian homesteaders received fee simple title to their property along with ownership of a water right that accompanied that property. According to *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), lands held in fee simple within the exterior boundaries of an Indian reservation with no "interest" in them owned by the United

States, are not "within a reservation. This concept explains why the State of Montana is allowed to charge property taxes to the owners of fee simple lands within the reservation.

Therefore it is against the Montana and United States constitutions for the tribes to take away these water rights and replace them with delivery rights without paying the owners just compensation. It is quite likely every owner of a water right on the reservation will bring suit for the taking of these water rights. As an independent paralegal I would love to be involved in this lawsuit.

From an article by Frank S. Johnson in today's OP-ED, page D3 in the Daily Inter Lake:

"Appendix 9, dated Jan. 28, 2015, of the compact clearly states in Water Right Number "76LJ 30063812 COMPACT," that the CSKT can divert up to 229,383 AC FT from anywhere on the Flathead River, or Flathead Lake, for any purpose at any time of the year. - - -

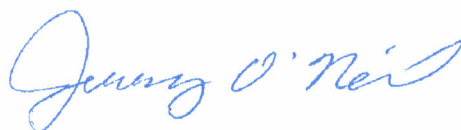
- - -
"In the commission's 2011 response to the tribes' request for this water, it was termed "supplemental" water. Supplemental?

"The creation of the Flathead Indian Reservation by the government implied the grant of sufficient water to meet the purposes of the reservation. That's the amount the Compact is supposed to quantify. If the water is "supplemental" it is by definition excess to the needs of the reservation. What necessitated the commission supplementing the Salish and Kootenai's other water by giving them rights to more water currently owned by Montana for the benefit of all her citizens?

"Again, why? There has to be a reason; so what is it? The appearance is that the tribes have been given the right to THE critical resource required for future economic development in the Flathead Basin. Why?

"The Confederated Salish and Kootenai Tribes have been granted RIGHTS to consume or lease 128,158 acre feet of that 229,383 acre feet of diverted water. 11,000 acre feet of the 128,158 is earmarked for lease to Flathead County for future development. The compact grants the tribes the right to lease the other 117,158 acre feet of water to anyone on or off the reservation (but within the Flathead and Clark Fork basins). The 2015 lease price for the 128,158 acre feet is \$40/acre foot, with the future price to be adjusted annually by the percentage increase in the Consumer Price Index for all Urban Consumers (CPI-U). This has the appearance of a perpetual CSKT "annual revenue stream" (2015 potential is \$5,126,320 adjusted by the CPI-U in future years) for which future Montana businesses and citizens will pay. Was this required to fulfill the purpose for which the Flathead Reservation was established? If so, why is it termed "supplemental?"

Since my first year in the Montana Senate was in 2001, I remember hearing about the fall out from the deregulation of the Montana Power Company. I believe passage of this proposed water compact will have far greater fall out than the one then. If I was sitting on this committee I would not vote for it.



Jerry O'Neil